UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	CR-06-29-B-W
	)	
	)	
BYRON POLK,	)	
	)	
Defendant.	)	

ORDER ON DEFENDANT'S OBJECTIONS

Byron Polk objects to the magistrate judge's refusal to continue a suppression hearing and to require the government to produce a witness. Concluding that these rulings were nondispositive, the Court denies the Defendant's objections because the rulings were neither contrary to law nor clearly erroneous.

I. STATEMENT OF FACTS

On March 22, 2006, Scott Kelley, an Inspector with the United States Postal Service, swore out a one-count criminal complaint against Byron Polk, claiming he attempted to persuade a minor to engage in sexually explicit conduct in order to produce a visual depiction of the conduct, an alleged violation of 18 U.S.C. § 2251(a). (Docket # 1). On April 4, 2006, a federal grand jury indicted the Defendant for the same crime. (Docket # 16). On May 12, 2006, Mr. Polk filed companion motions to suppress, seeking to suppress evidence obtained during a February 23, 2005 interview among the Defendant, Inspector Kelley, and Maine State Police Detective Brian Strout.

On June 14, 2006, this Court referred the motions to suppress to Magistrate Judge Kravchuk for recommended decision and on June 16, 2006, Magistrate Judge Kravchuk scheduled a hearing for June 29, 2006. (Docket # 43). On June 28, 2006, the Government moved to continue on the ground that Inspector Kelley had been transferred to Guam and was unavailable to testify and that Detective Strout was on vacation. *Gov't Mot. to Continue* (Docket # 44). The same day, the Court granted the motion, *Order* (Docket # 45), and gave notice of the new hearing date of July 10, 2006. *Notice* (Docket # 46). On July 5, 2006, the Defendant moved to continue to obtain a handwriting expert to analyze the signature on the Consent to Search form. *Def.'s Mot. to Continue* (Docket # 47). The Court granted the motion on July 5, 2006. (Docket # 48).

The Court gave notice on July 12, 2006 that the suppression hearing was rescheduled for August 1, 2006. *Notice* (Docket # 55). On July 31, 2006, the Defendant moved to continue the hearing because he had just learned that Inspector Kelley would not be available to testify and he also moved for an order to compel the appearance of Inspector Kelley. *Oral Mot. to Continue Suppression Hr'g and for Order Requiring Gov't to Produce Scott Kelley* (Docket # 57). On July 31, 2006, Magistrate Judge Kravchuk denied both motions. *Report of Telephone Conference and Order* (Docket # 58). She concluded that "there has been no showing that Scott Kelley is a material witness for the defense. The burden is on the government and it will have to go forward with whatever evidence it presents on the issues raised by the motion." *Id.* at 1. She also noted that the defendant's counsel had been "on notice since June 28, 2006, that Scott Kelley was unavailable to testify and in the last month he has made no effort to ascertain Scott Kelley's whereabouts or how to get him to the hearing." *Id.* at 1-2.

The suppression hearing proceeded on August 1, 2006. The Government called Detective Strout and the Defendant took the stand on his own behalf. *See Tr. of August 1, 2006 Proceedings* (Docket # 65). On August 2, 2006, the magistrate judge issued a Report and Recommended Decision, which recommended denial of the motions to suppress. *Recommended Decision* (Docket # 61). Magistrate Judge Kravchuk stated "Postal Inspector Scott Kelley did not testify at the hearing and these proposed findings of fact (other than background information regarding his status and involvement in the investigation) do not rely upon his affidavit." *Id.* at 1 n.1. Over the Defendant's objection, the Court affirmed the Recommended Decision. (Docket # 63, 66).

In addition, Defendant objected to the July 31, 2006 Report of Conference of Counsel. *Objection to Report of Conference of Counsel* (Docket # 64). He stated that before the June 29, 2006 hearing, the Government had notified defense counsel about the difficulty locating Inspector Kelley, but wrote to him that they would "continue to try to reach Scott…." *Id.* at 1. He further represented that it was not until July 31, 2006 that he learned that Inspector Kelley would not testify on August 1. *Id.* He seeks *de novo* review of the magistrate judge's decision to deny the motions.[1]

II. STANDARD OF REVIEW

The standard for review for a nondispositive motion is "contrary to law or clearly erroneous." Fed. R. Crim. P. 59(a). Ordinarily, ruling on a motion to continue or a motion to compel the attendance of a witness would be considered nondispositive, since the ruling by itself

[1] It may well be that now that this Court's ruling on this motion has been subsumed by this Court's *de novo* affirmance of the Recommended Decision. This is especially true, since the Defendant raised his objections to the magistrate judge's July 31, 2006 rulings as part of his objection to the Recommended Decision. Nevertheless, in fairness to the parties, particularly to the Defendant, the Court would rather explain why his objections have been overruled. To the extent the objections were part of the Defendant's objections to the Recommended Decision, the Court has already reviewed them on a *de novo* basis and rejected them. Assuming *arguendo* that the affirmance of the Recommended Decision is not dispositive of the Defendant's pending objections, the first question here is what the standard of review should be for objections made separately from a Recommended Decision.

would not dispose of a charge or defense. *See* Fed. R. Crim. P. 59(a). Mr. Polk, however, presents a counterintuitive, but admirably inventive, argument. He urges a *de novo* standard of review, because the rulings on these motions were, in his view, "critical in shaping the nature of the litigation" and, therefore, they had the same effect on the case as a dispositive motion. *Def.'s Supplement* at 1 (Docket # 97).

The language of the Rule itself shines little direct light on whether these particular motions should be considered dispositive.[2] *See* Fed. R. Crim. P. 59, advisory committee notes (2005 Adoption) ("Although the rule distinguishes between 'dispositive' and 'nondispositive' matters, it does not attempt to define or otherwise catalog motions that may fall within either category. Instead, that task is left to the case law."). The statute states that "a judge may designate a magistrate [magistrate judge] *to hear and determine* any pretrial matter pending before the court, except [select dispositive motions];" motions to continue and motions to compel the attendance of witnesses are not among the select exceptions provided.[3] 28 U.S.C. § 636(b)(1)(A) (emphasis added). The statutory provisions are "less than lucid, partly because of their complicated history…." *Conetta v. Nat'l Hair Care Ctrs., Inc.*, 236 F.3d 67, 72 (1st Cir. 2001). Nevertheless, the statutory list of dispositive motions is "nonexhaustive, and unlisted motions that are functionally equivalent to those listed in § 636(b)(1)(A) also are dispositive." *Vogel v. United States Office Prods. Co.*, 258 F.3d 509, 515 (6th Cir. 2001); *Victoria's Secret Stores v. Artco Equip. Co.*, 194 F. Supp. 2d 704, 714 (D. Ohio 2002).

---

[2] Rule 59(a) describes nondispositive matters as "any matter that does not dispose of a charge or defense." Fed. R. Crim. P. 59(a). Rule 59(b) expressly mentions as being dispositive a defendant's "motion to dismiss or quash an indictment or information, a motion to suppress evidence, or any matter that may dispose of a charge or defense." Fed. R. Crim. P. 59(b)(1).

[3] The eight statutory exceptions are: 1) for injunctive relief; 2) for judgment on the pleadings; 3) for summary judgment; 4) to dismiss or quash an indictment or information made by the defendant; 5) to suppress evidence in a criminal case; 6) to dismiss or to permit maintenance of a class action; 7) to dismiss for failure to state a claim upon which relief can be granted; and, 8) to involuntarily dismiss an action. 28 U.S.C. § 636(b)(1)(A).

The distinction between dispositive and nondispositive motions is "animated by… constitutional concerns." 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 3068.2, at 334 (2d ed. 1997). Dispositive motions "warrant particularized objection procedures and a higher standard of review because 'of the possible constitutional objection that only an article III judge may ultimately determine the litigation.'" *Id.* (quoting H. Rep. Report No. 94-1609, 94th Cong., 2d Sess. 16 (1976)).

There is little case law directly on point. In *Callier v. Gray*, the Sixth Circuit described the question as whether the motion is "similar to" to enumerated motions. 167 F.3d 977, 981 (6th Cir. 1999). Dispositive motions, though not statutorily enumerated, include a motion for default judgment, *Conetta*, 236 F.3d at 72, *Callier*, 167 F.3d at 981; a motion to strike pleadings with prejudice, *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1463 (10th Cir. 1988), and a Rule 11 motion for post-dismissal sanctions. *Plante v. Fleet Nat'l Bank*, 978 F. Supp. 59, 64-65 (D.R.I. 1997). One helpful formulation is whether, once the magistrate judge has issued the order, and the district judge has affirmed the order, there remains anything further to do but to "execute the judgment." *See Bennett v. Gen. Caster Serv. of N. Gordon Co.* 976 F.2d 995, 998 (6th Cir. 1992).

By contrast, the formulation in *Kiep v. Turner* potentially overextends the range of dispositive motions. 80 B.R. 521 (D. Haw. 1987). In *Kiep*, the Court observed that "if a motion involves a determination of the merits of the case, or it does not involve a collateral matter, or it is critical in shaping the nature of the litigation, courts will treat it as dispositive." *Id*. at 523-24. Many pretrial matters, discovery motions, and other similar motions could be "critical in shaping the nature of the litigation," yet are nondispositive. *See* 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 3068.2, at 342 n.32. To extend

the definition of dispositive motions to all matters "critical in shaping the litigation" would undercut the "integral and important role" that magistrate judges play in the federal judicial system, a role that is "nothing less than indispensable." *Peretz v. United States*, 501 U.S. 923, 928 (1991).

In this Court's view, once the district court refers a motion to suppress to a magistrate judge for a recommended decision, the magistrate judge assumes the authority and responsibility to decide such questions as whether and when to hold an evidentiary hearing, which witnesses will be allowed to testify, the admissibility of evidence proffered at the hearing, and other similar discretionary issues. The magistrate judge's rulings on these matters may be significant, even critical, in shaping the litigation, but this does not necessarily render them dispositive within the meaning of the statute and rule.[4]

Here, Mr. Polk moved to continue the suppression hearing and moved for the government to produce a witness. When the hearing went forward, Mr. Polk himself took the stand and testified as to what occurred during his interview by the police and the magistrate judge expressly declined to rely on the affidavit of Postal Inspector Kelley (other than for some non-controversial background information), since he had not testified at the hearing. *Recommended Decision* at 1 n.1. The magistrate judge's rulings may have had some impact on the persuasiveness of the Defendant's evidence at the suppression hearing, but they did not, in themselves, dictate the outcome. In this light, the magistrate judge's ruling on the motion to continue and the motion to produce a witness would not, if affirmed, have resulted in a final disposition of the case. *See Heuser v. Johnson*, 189 F. Supp. 2d 1250, 1257 (D.N.M. 2001)

[4] This is not an unalterable rule. A magistrate judge could issue what would ordinarily be a nondispositive ruling that has the effect of deciding the merits of a case. For example, depending on its impact on the underlying litigation, the imposition of a Rule 11 sanction may or may not be dispositive. *Compare Plante*, 978 F. Supp. 59; *with Smith & Green Corp. v. Trs. of Const. Indus.*, 244 F. Supp. 2d 1098 (D. Nev. 2003).

("Magistrate Judge Smith's Order denying the Motion to Enforce Subpoena was not dispositive…."). The Court reviews the Defendant's objection to the magistrate judge's rulings on his motion to continue and motion to compel the production of Inspector Kelley under the "contrary to law or clearly erroneous" standard.

III. DISCUSSION

The magistrate judge's rulings on the motion to continue and the motion for the production of Inspector Kelly are intertwined since both motions sought Mr. Kelley's presence as a witness at the suppression hearing. There are several reasons the magistrate judge's decision to deny the motions was neither contrary to law nor clearly erroneous.

First, the absence of evidence inured to the benefit of Mr. Polk. Once Mr. Polk moved to suppress evidence, the government assumed the burden to demonstrate that the evidence was properly obtained. Because the seizure of the computer was warrantless and the Government contended that Mr. Polk had consented, once Mr. Polk moved to suppress, the Government had the burden of proof. *United States v. Melendez*, 301 F.3d 27, 32 (1st Cir. 2002). The same is true of statements without the presence of an attorney, where the government claims the defendant has knowingly and intelligently waived his privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *United States v. Downs-Moses*, 329 F.3d 253, 267 (1st Cir. 2003) ("A defendant may make a valid waiver of his rights under Miranda if he does so voluntarily, knowingly and intelligently. The district court must begin with the presumption that the defendant did not waive his rights. The government bears the burden of proving a valid waiver by a preponderance of the evidence.") (internal citations omitted).

During the hearing, Mr. Polk recognized this argument and made it forcefully to the magistrate judge.[5]

Second, the primary issue for which Mr. Polk contends Inspector Kelley's testimony would have been essential is whether the police interview was a custodial interrogation. Magistrate Judge Kravchuk found that the police conduct was "exemplary in that they fully informed Polk of his Miranda rights and were polite and low key throughout the interview." *Recommended Decision* at 7. She found "no evidence that their behavior was unduly coercive." *Id.* She noted that Mr. Polk was "in full control of his faculties, albeit nervous about his situation." *Id.* At the hearing, Mr. Polk specifically testified to his version of what occurred during the brief interval that Detective Strout was out of the room. This portion of his testimony, therefore, was unrebutted. Magistrate Judge Kravchuk made her findings despite what Mr. Polk said, not because of what Inspector Kelley did not say.

Third, Mr. Polk argues that there were "material differences" between the testimony at the hearing and Mr. Kelley's affidavit regarding Mr. Polk's request for medication, his answering an incoming telephone call, the circumstances surrounding the Defendant's signing of the *Miranda* waiver, and whether Mr. Kelley had threatened Mr. Polk during the interview. However, the magistrate judge plainly said that she did "not rely upon his affidavit." *Recommended Decision* at 1, n.1. Thus, as a consequence of Inspector Kelley's absence, Mr. Polk was the only person to testify on these crucial matters. It remains difficult to imagine what the Defendant realistically could have gained from cross-examining the police officer that he did not achieve from his own testimony. It is always easier to argue with an empty chair.

[5] Mr. Hartley argued: "But beyond that, I don't even think the Court gets to that issue because the Government has simply failed to meet its burden, failed to produce testimony on the issue of whether or not threats were used, whether or not force and tactics were used. We have no idea on this record." *Tr.* at 80: 5-10.

Fourth, if the Defendant viewed Inspector Kelley's presence as essential, he had an obligation to take reasonable steps to ensure he was available to testify; he failed to do so. The motions to suppress had been pending since May 12, 2006 and the Defendant had known since late June that the person he claimed was his most important witness was in Guam. However, it was not until July 31, 2006, the day before the hearing, that the Defendant moved any legal levers in an effort to obtain Inspector Kelley's presence. That same day, the magistrate judge held a telephone conference and denied the Defendant's motion on the grounds that there had been "no showing that Scott Kelley is a material witness for the defense," the defendant "did not know if he could get Scott Kelley here on his own," and ever since June 28, 2006, the Defendant had made "no effort to ascertain Scott Kelley's whereabouts or how to get him to the hearing." *Report of Telephone Conference and Order* at 1-2. In his objection, Mr. Polk represented that Assistant United States Attorney Malone had notified defense counsel by e-mail dated June 27, 2006 that the Government would "continue to try to reach Scott…" and it was not until July 31, 2006, that defense counsel learned Inspector Kelley would not be present to testify. In these circumstances, the Defendant's claim that he was acting reasonably in relying on the Government to produce Inspector Kelley rings hollow. The Defendant bears some obligation to attempt to make certain that a witness he contends is central to his defense is present to testify.

Fifth, Magistrate Judge Kravchuk's decision to deny the eleventh-hour motion to continue was entirely consistent with her obligation to make certain that the criminal case against Mr. Polk proceeded expeditiously. The Complaint against Mr. Polk had been filed on March 22, 2006, and Mr. Polk had been under indictment since April 4, 2006. Although Mr. Polk was released on April 14, 2006, after a period of incarceration, he has been in home confinement and a number of stringent restrictions have been imposed. *Order Setting Conditions of Release*

(Docket # 25). The motions to suppress, which had been filed on May 12, 2006, had already been continued once due to this witness's unavailability, there was no showing that, if the matter were continued, Inspector Kelley would be available, and the magistrate judge had warned counsel not to file another motion to continue "sooner than 24 hours prior to the hearing."

IV. CONCLUSION

The Court OVERRULES the Defendant's objection to the magistrate judge's denial of his motion to continue and motion to require the Government to produce Scott Kelley.

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 27th day of December, 2006

Defendant

BYRON POLK (1) represented by **RICHARD L. HARTLEY**
LAW OFFICE OF RICHARD HARTLEY
15 COLUMBIA STREET
SUITE 301
BANGOR, ME 04401
207-941-0999
Email: hartleylaw@gmail.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Plaintiff

USA represented by **GAIL FISK MALONE**
OFFICE OF THE U.S. ATTORNEY
DISTRICT OF MAINE
202 HARLOW STREET, ROOM 111
BANGOR, ME 04401
945-0344
Email: gail.f.malone@usdoj.gov
LEAD ATTORNEY

ATTORNEY TO BE NOTICED